



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 1386, PORTSMOUTH
MUNICIPAL EMPLOYEES

Complainant

v.

CITY OF PORTSMOUTH

Respondent

CASE NO. A-0411:11

DECISION NO. 85-12

APPEARANCES

Representing AFSCME, Local 1386, Portsmouth Municipal Employees

Edward Edwards, Council Representative, AFSCME

Representing the City of Portsmouth

James J. Flynn, Assistant County Attorney

Also in Attendance

Russell Pratt, City of Portsmouth

Glenn Miles, Public Works Dept.

Rick Pizzi, Public Works Dept.

Dan Riciputi, Public Works Dept.

Dan Ayer, Public Works Director

Allen Leathers, President AFSCME Local 1386

Bentley Jessee, Unit V.P. AFSCME Local 1386

BACKGROUND

On January 17, 1985, AFSCME Local 1386, Portsmouth Municipal Employees filed an unfair labor practice charging the City of Portsmouth was in violation of RSA 273-A:5, I (a), (d), (h), (i). AFSCME is the exclusive representative of certain Portsmouth Municipal Employees including certain employees of Portsmouth Public Works Department. The Union and the City of Portsmouth are currently operating under collective bargaining agreement which expired June 30, 1984 but which is continuing in force while they are negotiating a new agreement.

AFSCME claims the following: That on or about January 2, 1985, Bentley Jessee, a laborer for the City Yard, Public Works Department, left work at approximately 7:45 a.m. Mr. Jessee is a member of the Local 1386 and covered by the collective bargaining agreement. On January 3rd, Mr. Jessee arrived at work and was told not to punch in until he met with the Director of Public Works. At the meeting with the Director of Public Works, Mr. Jessee received disciplinary action of a one and a half day suspension and a six month probation period. Mr. Jessee was informed that his departure on January 2, 1985, from the job site was being dealt with as a voluntary termination and that the one and a half day suspension and a six month probation were the conditions of his reinstatement. Mr. Jessee returned to work after the meeting on January 3, 1985 and continued to work for the City. On January 9, 1985, Mr. Jessee and AFSCME Local 1386 filed a grievance with the City of Portsmouth claiming unjust disciplinary action. On January 10, 1985, Mr. Jessee was informed by the Director of Public Works that he was discharged immediately due to the filing of a grievance. Mr. Bentley Jessee has been out of work since January 10, 1985. The Union contends that the City has committed unfair labor practice by discharging Mr. Bentley Jessee for filing a grievance about the way he was treated following his leaving work on January 2.

In its answer the City of Portsmouth agrees that Mr. Jessee was employed by them and was covered by the collective bargaining agreement but denies any violations of RSA 273-A. The City further agrees that Mr. Jessee left work on January 2 but disagrees over details on that incident. The City agrees there was a meeting on January 3rd but denies that Mr. Jessee was given disciplinary action at that meeting stating that Mr. Jessee was reinstated to his employment at approximately 12:00 Noon on January 3, 1985, and the conditions for his reinstatement to which he agreed was that he would not be paid for his day of absence from work and that he would be subject to a six month probation period with no loss of earned benefits. The City further agrees that Mr. Jessee's absence from work on January 2 to January 3, 1985 was treated as a voluntary termination. The City denies he was suspended for one and a half day as alleged. By way of further answer, the City states his one and a half day period was treated as a period of unauthorized leave for which Mr. Jessee was unpaid. It was necessary for him to submit an application for leave in order that he was insured continuity of benefits and wages. The City agrees that Mr. Jessee returned to work on January 3, 1985 but disagrees over the details of when he did so. The City further denies that Mr. Jessee was discharged because he filed a grievance and simply states that Mr. Jessee was discharged due to his unwillingness to accept the terms of his re-employment as outlined to him on January 3, 1985. The City further admits that Mr. Jessee has not been employed by them in the Public Works Department since on or about 11:55 a.m. on January 10, 1985. The City categorically denies committing any unfair labor practice under RSA 273-A:5.

A hearing was held at the Public Employee Labor Relations Board's office in Concord, New Hampshire on February 7, 1985 with all parties represented.

FINDINGS OF FACT AND RULINGS OF LAW

At the hearing on February 7, 1985, the City filed a Motion to Dismiss on the grounds that a grievance had been submitted as per the grievance procedure under the expired contract which has three steps, the last of which is binding arbitration and that since the Union was proceeding with the grievance there was no need for a further hearing on this matter.

The Union argued that the grievance was filed surrounding the events of January 2 and 3, 1985 and that that was the subject of the grievance but was not the subject of the unfair labor practice charge.

The Union stated the unfair labor practice was filed relative to actions surrounding the January 10th dismissal of Mr. Jessee because of filing the grievance and was therefore the proper subject for a PELRB action and hearing.

After a short caucus the Board decided to take the Motion to Dismiss under advisement and further to limit the hearing to the events surrounding the January 9th and 10th dismissal of Mr. Jessee. The hearing was continued under these restrictions.

Testimony was received clearly establishing that Mr. Jessee had filed a grievance and the grievance came to the attention of his supervisor and the Director of Public Works and that on January 10, 1985, the Director of Public Works ordered Mr. Jessee to punch out after he had referred to the fact that Mr. Jessee had filed a grievance. The Director of Public Works and several other witnesses testified that they were trying to help Mr. Jessee to avoid the fallout from having filed a grievance when they discussed with him his behavior following the incidents of January 2nd and 3rd. The Director of Public Works testified that Mr. Jessee's filing of the grievance was tantamount to rejecting reinstatement since the conditions of reinstatement put him on probation for six months and refused to pay him for the one and a half days. Mr. Jessee's termination took place by letter on January 14, 1985 by the Director of Public Works to Mr. Jessee, "As a result of action taken by yourself with regard to your reinstatement please be advised that you have been terminated effective 12:00 Noon, January 10, 1985."

The actions of the City in discharging Mr. Jessee after his having filed a grievance under the contract constitutes a violation of RSA 273-A:5, I (a) "to restrain, coerce or other interfere with its employees in exercise of the rights conferred by this chapter". It is the opinion of the Public Employee Labor Relations Board that employees do not surrender their right to file a grievance under their contract even should they agree with their employer under certain conditions to be reinstated to their position following a dispute over their behavior. The grievance procedure of any contract mandated by RSA 273-A must be seen as a method for the resolution of disputes under that contract and cannot be withdrawn by any mechanism of reinstatement.

DECISION AND ORDER

It is the decision of the Public Employee Labor Relations Board that the City of Portsmouth is guilty of violation of RSA 273-A:5, I (a) and the following order is hereby issued:

The City of Portsmouth is to make whole its employee, Bentley Jessee, for his lack of employment by the City commencing with his discharge date of January 10, 1985 and thereafter. Further, the City of Portsmouth is to reinstate Mr. Bentley Jessee to his previous position at his previous pay and benefits pending the outcome of the grievance as filed under their contract with AFSCME Local 1386.



ROBERT E. CRAIG, CHAIRMAN

Signed this 25th day of February, 1985.

By unanimous vote. Chairman Robert E. Craig presiding. Members Seymour Osman, Richard Roulx and Russell Verney present and voting. Also present, Evelyn C. LeBrun, Executive Director.